

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 60458-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
JOHN QUENTIN MORIMOTO,	)	
	)	
Appellant.	)	FILED: July 20, 2009

Grosse, J. — A prosecutor is not prohibited from pointing out deficiencies and inconsistencies in a defendant's statement given after the defendant was properly advised of his Miranda rights.<sup>1</sup> Remarking on defendant John Morimoto's failure to include certain details in his statement was nothing more than drawing an inference from the evidence and did not amount to prosecutorial misconduct. This is particularly true here, where Morimoto gave lengthy and detailed statements to the police prior to invoking his right to silence. The trial court is affirmed.

### FACTS

On the morning of October 3, 2003, in the home of Michelle and Michael Phan, John Morimoto used a knife to murder Michelle and Michael and seriously wound their 8-year-old daughter, Cindy. Various computer components and other items were taken from the home and the Phan's Hummer was missing from the driveway.

The police connected Morimoto to the crime through the Hummer, which

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

was found at a strip mall in Auburn where Morimoto's girl friend worked. Police conducted surveillance on the Hummer from an unmarked police car. Police Officers Wayne Himple and John Pagel observed a black Toyota Tundra pickup truck pull into the parking lot and drive slowly past the Hummer, make a "U-turn," and then come back and stop. The truck was registered to Morimoto's father at an address close to the victims' home.

The driver, later identified as Morimoto, exited his vehicle and retrieved a broom or a rake from the back of the truck and began sweeping leaves out from under the hedge near the Hummer. When Morimoto got back into his truck, the surveillance team blocked the truck and asked him to step out of the vehicle. Morimoto told the officers that he had argued with his fiancée the previous evening, and that during that argument, she became upset and threw her engagement ring into the hedge where he was looking for it. Officer Pagel asked Morimoto for identification which was in the truck. As Morimoto rifled through the truck, Officer Himple noticed what he thought was blood spatter on Morimoto's shoes and clothing. Officer Himple immediately grabbed Morimoto's left arm, spun him around, and asked Officer Pagel to get his handcuffs. Morimoto became physically aggressive, trying to pull away his arms and squirming. Both officers attempted to restrain Morimoto, but lost control of his hands. Officer Himple tried to place Morimoto in a headlock, and Officer Pagel punched him in the kidney area with his right fist. Morimoto continued to resist and broke free. The officers chased Morimoto for about 100 yards when he

suddenly stopped and faced them saying, "Just go ahead and shoot me. I am dead anyways." The officers directed Morimoto to lie down on the ground several times.

Morimoto told the officers he was paid a lot of money to destroy evidence. He also said that when the people who paid him found out he did not destroy the evidence, they would kill him and his fiancée. When the police officers said they would protect him, he responded that they could not protect him from the Vietnamese gangs, who would get to him whether he was on the street or in jail. He then told the officers that he could take both of them, and that they would have to shoot him.

Officer Himple told Morimoto that he was acting more like a person who did the crime than one who was supposed to destroy the evidence. Morimoto responded, "[Y]ou are very good," paused, and then said, "[B]ut I didn't do it." Officer Pagel holstered his gun and told Morimoto that he knew where Morimoto lived and if he was going to run to just go ahead. Sirens from arriving Auburn police were audible. Morimoto tensed his body and rose up on his toes; Pagel redrew his pistol in response. Morimoto was again directed to lie down but failed to comply. Because of the officers' earlier experience trying to physically restrain Morimoto, Officer Pagel directed the Auburn police officers to use a taser. Morimoto went limp and was handcuffed.

Morimoto was helped up and almost immediately began telling the officers why he was at the parking lot. He also expressed concern for his safety

because the people who paid him to take care of the Hummer would see him being arrested. The police quickly moved Morimoto into the patrol car, lifted the trunk lid so that no one could see him, and informed Morimoto of his Miranda rights. Although the officers could not recall the specific words used by Morimoto, he conveyed that he understood and waived them. Morimoto asserted that he was at the Majestic nightclub when he ran into some Vietnamese gang members, known only by their nicknames—Demon Knight, J.C., and Spiker. These gang members paid Morimoto to torch the Hummer and told him that the keys were in the nearby hedge. Morimoto later changed his story and said the gang drove him by the Hummer and pointed out exactly where the keys could be found. He also said that he had previously worked for these three gang members as an “encryption specialist” for their drug sales and car thefts.

Pursuant to a search warrant, the police searched Morimoto’s house. In Morimoto’s bedroom closet, the police discovered computer components, a scanner, a photo printer, and a camcorder belonging to the Phans. Bloodstains found on these items yielded DNA (deoxyribonucleic acid) profiles consistent with Michelle Phan’s profile; Cindy Phan and Morimoto could not be excluded as possible contributors to one of the samples. Further, the camcorder contained footage of Michelle and Cindy Phan on vacation in Hawaii. All of these items were discovered hidden under a comforter in Morimoto’s closet.

Morimoto was charged with two counts of first degree aggravated murder

and one count of first degree attempted murder. In a CrR 3.5 hearing the trial court ruled all of Morimoto's statements were admissible. After a trial by jury, Morimoto was found guilty as charged and sentenced to life without parole.

Morimoto appeals his convictions contending that he did not knowingly, intelligently, and voluntarily waive his Miranda rights, as those rights were read to him shortly after he was tased by the police. Morimoto also contends that the prosecutor improperly commented on his silence in both the direct examination of the lead detective and in closing argument. Lastly, Morimoto contends the trial court erred in admitting the identification testimony of the then 8-year-old witness-victim.

## ANALYSIS

### Custodial Statements

Morimoto contends that he was severely beaten by the police and then tased, which incapacitated him to such an extent that he was unaware that he was apprised of his Miranda rights. The trial court held a CrR 3.5 hearing to determine the admissibility of Morimoto's custodial statements.<sup>2</sup> In its findings of fact and conclusions of law, the trial court found that in the presence of Officer Pagel, Officer Himple read Morimoto his Miranda rights while Morimoto was seated in the patrol car. Neither officer could recall Morimoto's exact response, but Officer Pagel did recall that Morimoto waived his right to remain silent and answered several questions, volunteering some information about his connection with the murders. Officer Pagel's interrogation stopped when

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<sup>2</sup> Morimoto's statements made to the police prior to his arrest are not at issue.

Detectives Steve Kelly and David Patterson arrived on the scene. The detectives then took Morimoto's shoes into evidence and had him transported to the Kent Police station.

At the station, Morimoto provided information and responded to questioning for approximately one hour and 20 minutes. Detective Kelly asked questions and took notes; the contents of the interview were admitted into pretrial evidence. Morimoto's responses to questions throughout the interview were consistent with the information he had given Officers Pagel and Himple during the standoff prior to his arrest.

During the interview, Morimoto provided accurate and responsive information including his age, place of employment, and address. Detective Kelly testified that at no time was he concerned about Morimoto's mental state. The interview ceased when Morimoto requested an attorney.

Once placed in custody, Morimoto appropriately responded to all questions and commands. This included his standing up from the car and shaking off his shoes so that the police could collect them for evidence.

Morimoto testified at the CrR 3.5 hearing. He claimed that he remembered nothing after he was tased until he arrived at the Kent Police Department. Later in his testimony, he stated that he remembered having his shoes taken into evidence and recalled other discussions at the scene after he had been tased and arrested. He then further testified that no one had any verbal contact with him after he was placed in the police car and no one advised

him of his rights. The court found Morimoto's testimony to be contradictory and not credible and that the State had proven by a preponderance of the evidence that Morimoto's statements were given after proper advisement of his Miranda rights and his voluntary waiver of those rights.

Self-incriminating statements obtained from persons in custody are presumed involuntary and their admission violates the Fifth Amendment unless the State can establish the defendant knowingly and voluntarily waived his Fifth Amendment privilege.<sup>3</sup> As noted by the Supreme Court in State v. Broadaway, the test for voluntariness is whether, considering a totality of the circumstances, the confession was coerced.<sup>4</sup> Circumstances a court considers include the defendant's condition, the defendant's mental abilities, and the conduct of the police.<sup>5</sup> Morimoto gave detailed responses to the questioning and demonstrated that he was able to follow the officers' directions. The only contradictory evidence before the trial court was Morimoto's own testimony at the CrR 3.5 hearing. And this testimony was itself contradictory. The credibility of a witness is a matter for determination by the trial court.<sup>6</sup> Under these circumstances, the trial court's conclusion that Morimoto's statements were voluntarily given is supported by the record. Substantial evidence supports the trial court's finding that Morimoto knowingly, voluntarily, and intelligently waived his Miranda rights before speaking to the detectives.

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<sup>3</sup> State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

<sup>4</sup> 133 Wn.2d 118, 131-32, 942 P.2d 363 (1997).

<sup>5</sup> Broadaway, 133 Wn.2d at 131-32 (citing State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984)).

<sup>6</sup> State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Prosecutorial Misconduct

Morimoto argues that prosecutorial misconduct deprived him of a fair trial; he alleges the prosecutor improperly commented on Morimoto's right to remain silent during the prosecutor's questioning of the lead detective and again in closing argument. Comments on post-arrest silence implicate the Fifth Amendment to the United States Constitution, which states, in part, that no person "shall be compelled in any criminal case to be a witness against himself."<sup>7</sup> Comments on post-arrest silence have been held to be a violation of a defendant's right to due process, because Miranda warnings implicitly assure defendants that remaining silent when facing the State's accusations carries no penalty with it.<sup>8</sup>

The State may not comment on a defendant's silence.<sup>9</sup> An impermissible comment on silence occurs when the State uses the defendant's constitutionally permitted silence as substantive evidence of guilt or to infer an admission of guilt.<sup>10</sup> No objections were made to either the questioning of the lead detective or to the comments of the prosecutor in closing argument.

In questioning the lead detective, the prosecutor asked a series of questions to establish whether Morimoto made any comments regarding particular items that belonged to the Phans, which were discovered hidden in Morimoto's closet. These items were introduced into evidence through other

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<sup>7</sup> Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); U.S. Const. amend. V.

<sup>8</sup> State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996).

<sup>9</sup> State v. Sargent, 40 Wn. App. 340, 347, 698 P.2d 598 (1985).

<sup>10</sup> State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).



testimony. Where a defendant waives the right to remain silent and makes a partial statement to police, that statement may be used to impeach the defendant's inconsistent trial testimony. In his opening statement, the defense put forth the theory that the Vietnamese gang delivered the items to Morimoto. In State v. Scott, this court stated:

We see no reason why the State's right to comment upon inconsistencies between a defendant's post-Miranda "partial silence" and trial testimony by the defendant does not extend, with equal logic, to inconsistencies between such partial silence and defense theories pursued at trial without actual testimony from the defendant.<sup>[11]</sup>

Here, the defense was that Morimoto did not commit the murders, but was merely hired by three unknown Asian gang members to dispose of the Hummer. Morimoto attempted to explain away the Phans' possessions that he did have in custody. For example, he said the Phans' money found in his truck was payment from the Asian gang members. However, he offered no explanation regarding all of these additional items found in his closet. During opening argument, defense counsel set forth a theory explaining the presence of these items and informed the jury that they would hear a more detailed explanation from Morimoto's testimony. Under the reasoning found in Scott, the partial statement given by Morimoto opened the door to this line of questioning.

Morimoto also contends that prosecutorial misconduct occurred during closing argument when the prosecutor referred to Morimoto's lack of explanation regarding certain items of evidence. In particular, Morimoto cites to three

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<sup>11</sup> 58 Wn. App. 50, 55, 791 P.2d 559 (1990) (emphasis added).

paragraphs of the prosecutor's argument in which the prosecutor states:

Is it a huge coincidence that in the bag that Detective Kelly seized from the office that had documents from Mr. Morimoto in it, is it a huge coincidence that the bank bag is identical to the one that Michelle Phan used? No bank bags are found in the house. Anna Nguyen said she used a bank bag like this to take the nightclub receipts home, that this would be placed into the safe that we later find empty. There's no explanation of this given to Detective Kelly. I mean, it's not asked about but it's certainly not mentioned.

And again in referring to the contents of a bag found in the truck Morimoto was driving when arrested:

I think at most what [Morimoto] says is he opened this thing up and he's taken a look inside and he says that there are documents that appear to be connected to Michael Phan. He doesn't say he does anything else with this bag.

But when Patterson and Kelly went through this bag, they found multiple documents of the defendant's. . . . His property has become mixed in with the victim's. And although he gives great detail about many things in the statement he gives to Kelly, there is really no explanation of that in that statement, and actually an implication that he really is kind of frightened of this bag or incredibly worried about it to a degree that he wouldn't be putting his own stuff in here.

Finally, when arguing about the Phans' property contained in Morimoto's closet at home, the prosecutor argues:

So there's no explanation in what he tells Patterson or Kelly or even Pagel as to how these significant items of evidence ended up in his closet.

He tells Kelly nothing about the nocturnal visits to the Humvee, either with a Tundra at one o'clock or the Camry around 4:00 [a.m.]

But these statements are not a comment on Morimoto's silence. The argument proffered by the prosecutor is nothing more than a refutation of the detailed statement that Morimoto had given the police. The prosecutor's pointing out of

inconsistencies and improbabilities are not comments on Morimoto's silence, but rather, an inference from the evidence and do not amount to prosecutorial misconduct.

Morimoto's reliance on State v. Burke is misplaced.<sup>12</sup> In Burke, the defendant was charged with rape of a child in the third degree for intimate relations with a minor. Justin Burke asserted that he reasonably believed the victim to be 16 years of age.<sup>13</sup> The State sought to undermine Burke's assertion because, if the victim had told him that she was 16, he should have commented on that in his first interview with the police or when the victim's sister called him the next day. In Burke, unlike here, the prosecution invited the jury to infer guilt from the defendant's termination of the interview with the detective, implying that Burke did so because he had done something wrong. Here, the prosecutor's arguing that Morimoto's failure to include various items in his statement to the police was not a comment on his silence, but rather that Morimoto's accusation of three unknown Asian men as the killers alerted the jury to the improbability of Morimoto's statements and that such statements were nothing more than a fabricated defense. The burden is on the defendant to show that a prosecuting attorney's conduct was both improper and prejudicial.<sup>14</sup> Viewed in the context of the entire argument presented at trial, these statements and questions do not amount to prosecutorial misconduct.

#### Admission of Eyewitness Testimony

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<sup>12</sup> 163 Wn.2d 204, 181 P.3d 1 (2008).

<sup>13</sup> Burke, 163 Wn.2d at 208.

<sup>14</sup> State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006).

Over objection, Cindy Phan testified at trial. She testified that her mother was helping her to get ready for school when the doorbell rang. Her mother answered the door and started screaming. Cindy saw her mother fall down next to her and saw that the man who entered had a knife. She testified that she recognized Morimoto as the attacker. Cindy knew Morimoto from the neighborhood. As Morimoto was attacking her with the knife she was “thinking that he was John but not sure.”

Morimoto moved to exclude any statements that Cindy made after October 30, 2003—essentially all of the statements after her first statement. In Cindy’s first statement she stated that she did not know who the attacker was. The defense did not challenge Cindy’s competency to testify, but argued that the information provided in her subsequent statements identifying Morimoto as the perpetrator was from external sources that Cindy had subsequently internalized and thus believed to be true. ER 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

The decision whether to admit a witness’s testimony is an evidentiary matter addressed to the sound discretion of the trial court.<sup>15</sup> Morimoto challenges the admission of Cindy’s testimony on the basis that it was not reliable under the standard established in Manson v. Brathwaite.<sup>16</sup> The issue in

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<sup>15</sup> State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

<sup>16</sup> 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

that case was whether pretrial identification evidence obtained in a manner that was both suggestive and unnecessary should be excluded because reliability is the “linchpin in determining the admissibility of identification testimony.”<sup>17</sup> The factors to be considered included “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”<sup>18</sup> As noted in State v. Vaughn, “the effect of Brathwaite was to expand the range of identification testimony which could be heard by the trier of fact.”<sup>19</sup> The Vaughn court also noted that the reliability factors developed in Brathwaite were to overcome a per se rule of inadmissibility.<sup>20</sup> As noted in State v. Linares, “the due process clause does not condition admissibility of identification testimony on proof of its reliability.”<sup>21</sup> Under ER 602, a witness must testify concerning facts within his personal knowledge.<sup>22</sup> It is the provenance of the jury to determine what weight should be given to the testimony.<sup>23</sup>

Here, the jury heard not only Cindy’s testimony, but also the testimony of Morimoto’s expert, Dr. Phillip Esplin. Dr. Esplin opined that Cindy’s testimony was unreliable as it was tainted by memories of post-event suggestions from others. Under cross-examination, however, Dr. Esplin also opined that Cindy’s

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<sup>17</sup> Brathwaite, 432 U.S. at 114.

<sup>18</sup> Braithwaite, 432 U.S. at 114.

<sup>19</sup> 101 Wn.2d 604, 608, 682 P.2d 878 (1984).

<sup>20</sup> Vaughn, 101 Wn.2d at 608.

<sup>21</sup> 98 Wn. App. 397, 403, 989 P.2d 591 (1999).

<sup>22</sup> Vaughn, 101 Wn.2d at 611.

<sup>23</sup> Linares, 98 Wn. App at 403.

identification of Morimoto as her attacker could be reliable.

Morimoto also cites a New Jersey case, State v. Michaels, to support his position that Cindy's testimony should have been excluded.<sup>24</sup> In Michaels, a nursery school teacher was convicted of sexual abuse against children in her care. The thrust of Michaels was whether a trial court must hold a pretrial hearing when there are allegations that the State used improper techniques.<sup>25</sup> No such allegations, however, are present here. Moreover, the Michaels reasoning has been rejected by several courts, including Oregon. See for example, State v. Bumgarner, in which the Oregon court found that the Michaels court "conflated the competency of the witness with the reliability of potential testimony that the witness might give."<sup>26</sup> As noted by the Bumgarner court, "the trier of fact, rather than the judge, is in the best position to determine the effect, if any, of improper interviewing techniques on a witness's credibility."<sup>27</sup>

In the present case, Cindy testified that she recognized Morimoto from the neighborhood. The defense did not cross-examine her. The reliability of Cindy's testimony was within the purview of the trier of fact.

Statement of Additional Grounds (SAG)<sup>28</sup>

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<sup>24</sup> 136 N.J. 299, 642 A.2d 1372 (1994).

<sup>25</sup> Michaels, 642 A.2d at 1374.

<sup>26</sup> 219 Or. App. 617, 633, 184 P.3d 1143, 1151 (2008).

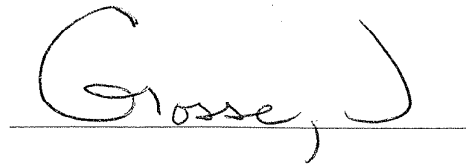
<sup>27</sup> Bumgarner, 184 P.3d at 1151.

<sup>28</sup> Morimoto has also submitted a motion to reconsider this court's denial of his motion to modify a commissioner's ruling that Morimoto's personal restraint petition be heard separately from this direct appeal. As that matter has already been decided, this court will not reconsider. Morimoto's motion to compel copies of the sealed portion of the proceedings and state trial exhibits is denied as they were not pertinent to this appeal.

In his SAG, Morimoto contends that the trial court erred in failing to grant his motion to terminate his legal financial obligations as he is indigent and does not have the present or future ability to pay such obligations. This precise issue was addressed and decided by this court in State v. Curry.<sup>29</sup> There, we held that RCW 7.68.035 makes the imposition of the victim penalty assessment mandatory, and further, the mandatory imposition of these minimal amounts does not implicate any constitutional rights.<sup>30</sup>

Restitution is specifically mandated and authorized by statute and its imposition is proper.<sup>31</sup> Furthermore, failure to enter findings of a defendant's ability to pay court costs is not constitutional error requiring resentencing.<sup>32</sup>

The judgment and sentence is affirmed.

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WE CONCUR:

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<sup>29</sup> 62 Wn. App. 676, 814 P.2d 1252 (1991).

<sup>30</sup> Curry, 62 Wn. App. at 681.

<sup>31</sup> RCW 9.94A.753; State v. Huddleston, 80 Wn. App. 916, 928-29, 912 P.2d 1068 (1996).

<sup>32</sup> State v. Eisenman, 62 Wn. App. 640, 646-47, 817 P.2d 867 (1991).